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82-302

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 198_

NO. _____

STANLEY HODGE,

PETITIONER,

-VS-

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF SOUTH CAROLINA

LESTER L. BATES, JR.
LEAD COUNSEL

OF COUNSEL:

LESTER L. BATES, III*

(*NOT ADMITTED TO THE BAR OF THE SUPREME COURT OF THE UNITED STATES)

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QUESTION PRESENTED FOR REVIEW

WHETHER THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHERE A SINGLE RETAINED COUNSEL REPRESENTS TWO DEFENDANTS AT TRIAL IN A STATE CRIMINAL PROCEEDING AND TIMELY STATES TO THE COURT THAT A CONFLICT OF INTEREST EXISTS AND THE TRIAL COURT FAILS TO INQUIRE AS TO THE POSSIBLE CONFLICT OF INTEREST OF COUNSEL AND REFUSES TO DECLARE A MISTRIAL.

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REPORT OF OPINION BELOW

THE PER CURIAM OPINION OF THE SOUTH CAROLINA SUPREME COURT IN THIS CASE, OFFICIALLY REPORTED AS STATE V. HODGE, ____ S.C.____, 292 S.E.2D 600 (1982), IS SET OUT AS APPENDIX A. DESPITE THE FACT THAT THE BRIEF OF THE PETITIONER FILED WITH THE STATE SUPREME COURT ARGUED THIS QUESTION (SEE APPENDIX B), IT IS NOT SPECIFICALLY DEALT WITH IN THE OPINION OF THE STATE SUPREME COURT.

GROUNDS FOR JURISDICTION

THE OPINION OF THE SOUTH CAROLINA SUPREME COURT WAS ENTERED ON JUNE 10, 1982. A PETITION FOR REHEARING AND A MOTION FOR ENLARGEMENT OF TIME WAS FILED OUT OF TIME ON JULY 16, 1982, DUE TO THE FACT THAT ORIGINAL APPELLATE COUNSEL REQUESTED LEAVE TO WITHDRAW AND CURRENT COUNSEL WAS NOT RETAINED UNTIL AFTER THE PERIOD OF TIME FOR A

PETITION FOR REHEARING HAD EXPIRED. THE AFORESAID PETITION AND MOTION ARE STILL PENDING BEFORE THE SOUTH CAROLINA SUPREME COURT. HOWEVER, THE AFORESAID PETITION WAS NOT TIMELY FILED UNDER LOCAL PRACTICE WITH REGARDS TO RULE 20.4 OF THIS HONORABLE COURT. THIS PEITION FOR CERTIORARI WAS FILED WITHIN SIXTY (60) DAYS AFTER THE ENTRY OF THE JUDGMENT OF THE SOUTH CAROLINA SUPREME COURT. THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT SIX.

IN ALL CRIMINAL PROCEEDINGS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED

WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

UNITED STATES CONSTITUTION
AMENDMENT FOURTEEN, SECTION 1.

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

THE PETITIONER, STANLEY HODGE, ALONG WITH HIS CO-DEFENDANT JESSIE MCLEOD, WAS INDICTED ON MARCH 2, 1981 FOR ACCESSORY AFTER THE FACT OF A FELONY, CRIMINAL CONSPIRACY AND RECEIVING STOLEN GOODS.

THE CASE CAME TO BE HEARD AT A REGULAR TERM OF THE COURT OF GENERAL SESSIONS FOR SUMTER COUNTY, SOUTH CAROLINA, ON JUNE 1, 4 AND 5, 1981, BEFORE THE HONORABLE ERNEST A. FINNEY, JR., RESIDENT JUDGE, AT SUMTER, SOUTH CAROLINA.

BOTH DEFENDANTS WERE REPRESENTED AT A TRIAL BY JURY BY THE SAME DEFENSE COUNSEL, C. C. HARNESS, III, ESQUIRE, OF SUMMERTON, SOUTH CAROLINA. AT TRIAL, BOTH DEFENDANTS TOOK THE STAND AND DENIED THEIR GUILT. THE CASE WAS SUBMITTED TO THE JURY AND JESSIE MCLEOD WAS CONVICTED ON ALL COUNTS, AND STANLEY HODGE WAS CONVICTED OF ACCESSORY AFTER THE FACT OF A FELONY AND CRIMINAL

CONSPIRACY AND FOUND NOT GUILTY ON THE CHARGE OF RECEIVING STOLEN GOODS.

JESSIE MCLEOD WAS SENTENCED TO BE CONFINED FOR ONE YEAR ON THE CHARGE OF ACCESSORY AFTER THE FACT OF A FELONY, THE SENTENCE WAS ONE YEAR'S CONFINEMENT ON THE CHARGE OF CONSPIRACY, AND THE SENTENCE WAS THREE YEAR'S CONFINEMENT ON THE CHARGE OF RECEIVING STOLEN GOODS. THESE SENTENCES WERE ALL CONCURRENT.

STANLEY HODGE WAS SENTENCED TO BE CONFINED FOR ONE YEAR ON THE CHARGE OF ACCESSORY AFTER THE FACT OF A FELONY AND THE SENTENCE WAS ONE YEAR'S CONFINEMENT ON THE CHARGE OF CONSPIRACY. THESE SENTENCES WERE CONCURRENT.

A NOTICE OF INTENT TO APPEAL WAS TIMELY FILED AND THE APPEAL WAS HEARD. THE CONVICTIONS OF THE PETITIONER WERE AFFIRMED, WITH THE EXCEPTION OF THE CONVICTION FOR ACCESSORY AFTER THE FACT OF A FELONY, WHICH

WAS REVERSED FOR GROUNDS NOT RELEVANT TO THIS PETITION FOR CERTIORARI.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED IN THE COURT OF FIRST INSTANCE AFTER THREE OF THE WITNESSES FOR THE STATE HAD TESTIFIED. SEE APPENDIX C, PP. 1-4. THE MOTION FOR MISTRIAL BASED UPON THE FEDERAL QUESTION WAS ALSO MADE AFTER THE STATE RESTED ITS CASE. SEE APPENDIX C, PP. 5-6. THE MOTION WAS MADE AGAIN AFTER THE JURY RETURNED THE VERDICT. SEE APPENDIX C, PP. 7-9. ALL MOTIONS WERE DENIED. BEFORE THE SOUTH CAROLINA SUPREME COURT, THE QUESTION WAS BRIEFED BUT NOT DEALT WITH IN THE OPINION OF THAT HONORABLE COURT. SEE APPENDICES A AND B.

IT IS SUBMITTED THAT THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI.

THE PETITIONER AND HIS CO-DEFENDANT WERE JOINTLY REPRESENTED AT TRIAL BY C. C. HARNESS, ESQUIRE. THE PETITIONER WAS REPRESENTED FOR THE APPEAL TO THE SOUTH CAROLINA SUPREME COURT BY KENNETH R. YOUNG, JR., ESQUIRE. COUNSEL FOR THIS PETITION IS LESTER L. BATES, JR., ESQUIRE.

REASONS FOR THE ALLOWANCE OF THE WRIT

WHETHER THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHERE A SINGLE RETAINED COUNSEL REPRESENTS TWO DEFENDANTS AT TRIAL IN A STATE CRIMINAL PROCEEDING AND TIMELY STATES TO THE COURT THAT A CONFLICT OF INTEREST EXISTS AND THE TRIAL COURT FAILS TO INQUIRE AS TO THE POSSIBLE CONFLICT OF INTEREST OF COUNSEL AND REFUSES TO DECLARE A MISTRIAL.

THIS CASE SQUARELY PRESENTS TO THE UNITED STATES SUPREME COURT THE QUESTION LEFT UNDECIDED IN HOLLOWAY V. ARKANSAS, 435 U.S. 475 (1978) AND CUYLER V. SULLIVAN, 446 U.S. 335 (1980): AT WHAT POINT IN A TRIAL MUST THE TIMELY OBJECTION TO MULTIPLE REPRESENTATION BE MADE?

BEFORE ANALYZING THIS QUESTION, THE SIMILARITIES OF THIS CASE TO HOLLOWAY AND CUYLER SHOULD BE NOTED. ALL THREE CASES, OF COURSE, INVOLVED REPRESENTATION OF MULTIPLE DEFENDANTS BY A SINGLE DEFENSE COUNSEL. IN ALL THREE CASES, THERE WAS NO INQUIRY BY THE TRIAL COURT INTO POSSIBLE CONFLICTS OF INTEREST. BOTH CUYLER AND THE IMMEDIATE

CASE INVOLVED RETAINED COUNSEL AT TRIAL AS OPPOSED TO THE APPOINTED COUNSEL IN HOLLOWAY; HOWEVER, THE COURT STATED IN CUYLER THAT THIS DISTINCTION IS IRRELEVANT. 446 U.S., AT 343. IF THE OBJECTION IN THIS CASE IS DEEMED TO BE TIMELY, THE HOLDING OF HOLLOWAY THAT "WHENEVER A TRIAL COURT IMPROPERLY REQUIRES JOINT REPRESENTATION OVER TIMELY OBJECTION REVERSAL IS AUTOMATIC" WOULD APPLY WITHOUT INQUIRY INTO WHETHER THERE WAS ACTUAL PREJUDICE. SEE HOLLOWAY, SUPRA, AT 487-491. THE ONLY FACTOR DISTINGUISHING HOLLOWAY, CUYLER AND THE IMMEDIATE CASE IS THE TIME IN WHICH THE OBJECTION TO MULTIPLE REPRESENTATION WAS NOTED BY DEFENSE COUNSEL.

IN HOLLOWAY, DEFENSE COUNSEL MOVED THE TRIAL COURT UNSUCCESSFULLY TO APPOINT SEPARATE COUNSEL FOR THE DEFENDANTS WELL IN ADVANCE OF THE TRIAL DATE. SEE HOLLOWAY, SUPRA, AT 483-487. IN CUYLER, THE ISSUE WAS NEVER RAISED AT TRIAL. SEE CUYLER, SUPRA,

AT 348. IN THE IMMEDIATE CASE, THE ISSUE WAS RAISED AFTER THE STATE HAD PRESENTED THREE WITNESSES AND WAS RENEWED PERIODICALLY THROUGHOUT THE TRIAL AT APPROPRIATE TIMES. SEE APPENDIX C.

THERE WAS ONE FACTOR PRESENT IN BOTH HOLLOWAY AND THE IMMEIDATE CASE THAT WAS NOT IN CUYLER: THE OBJECTION WAS RAISED BY DEFENSE COUNSEL AND THE COURT FAILED TO MAKE AN ADEQUATE INQUIRY. THE TRIAL JUDGE IN THIS CASE RAISED SUA SPONTE HIS "CONCERN ABOUT THE POTENTIAL CONFLICT." APPENDIX C, P. 2. INDEED, AT THE CLOSE OF THE CASE, THE COURT NOTED "I SAID THERE MAY BE A CONFLICT . . . ." APPENDIX C, P.8.

DESPITE THE POSSIBLE CONFLICT NOTED BY THE TRIAL COURT ITSELF AND THE ASSERTIONS OF A CONFLICT BY DEFENSE COUNSEL, THERE WAS NO INQUIRY INTO THE PROPRIETY OF JOINT REPRESENTATION. FOR INSTANCE, THE COURT HAD THE ALTERNATIVE OF PERSONALLY

ADVISING "EACH DEFENDANT OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, INCLUDING SEPARATE REPRESENTATION." FED. R. OF CRIM. PRO., R.44(C). WHILE THE FEDERAL RULE IS NOT MANDATED UPON THE STATES, NUMEROUS COURTS AND COMMENTATORS HAVE URGED THAT THE PRACTICE SPECIFIED IN THE RULE BE FOLLOWED BY STATE COURTS, E.G., STATE V. OLSEN, 258 N.W.2D 898 (MINN. 1977); PEOPLE V. BAFFI, 49 N.Y.2D 820, 427 N.Y.S2D 615, 616 (1980); ABRAHAM V. UNITED STATES, 549 F.2D 117 (2D CIR. 1975); UNITED STATES V. LAURINS, 568 F.2D 98 (8TH CIR. 1977). SEE ALSO ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE §3.4(6); HYMAN, JOINT REPRESENTATION OF MULTIPLE DEFENDANTS IN A CRIMINAL TRIAL: THE COURT'S HEADACHE, 5 HOFSTRA L. REV. 315, 334 (1977). INDEED, WERE THIS HONORABLE COURT TO ADOPT THE MANDATES OF THE RULE AS A CONSTITUTIONAL REQUIREMENT, THE

QUESTIONS AS TO THE NECESSARY EXTENT OF INQUIRY BY THE TRIAL COURT WOULD BE MADE CLEAR.

THE DETERMINATION OF THE EXTENT OF INQUIRY MANDATED BY HOLLOWAY IS NOT NECESSARY HERE. UNDER ANY STANDARD, THE INQUIRY WAS INSUFFICIENT. THE TRIAL COURT NOTED THE POSSIBLE CONFLICT, BUT REFUSED A MISTRIAL WITHOUT INQUIRY TO DEFENSE COUNSEL OR TO THE DEFENDANTS THEMSELVES.

AT ONE POINT, THE TRIAL COURT STATED "THAT ANY POTENTIAL CONFLICT WAS KNOWN PRIOR TO THE INSTITUTION OF THESE PROCEEDINGS AND THE SELECTION AND SWEARING OF THE JURY." APPENDIX C, P.6. THIS IS A DIRECT CONFLICT WITH THE MANDATE OF HOLLOWAY WHERE THE COURT STATED "WHEN AN UNTIMELY MOTION FOR SEPARATE COUNSEL IS MADE FOR DILATORY PURPOSES, OUR HOLDING DOES NOT IMPAIR THE TRIAL COURT'S ABILITY TO DEAL WITH COUNSEL WHO RESORT TO SUCH TACTICS." EVEN IF TRIAL COUNSEL WAS

DILATORY IT IS IMPLICIT IN THE FOREGOING STATEMENT BY MR. CHIEF JUSTICE BURGER THAT THE TRIAL COUNSEL SHOULD BEAR THE BURDEN OF SUCH QUESTIONABLE BEHAVIOR RATHER THAN THE DEFENDANTS.

THIS LEAVES THE ONLY REAL DISTINCTION BETWEEN THE IMMEDIATE CASE AND HOLLOWAY: THE ISSUE OF WHAT CONSTITUTES A TIMELY OBJECTION TO MULTIPLE REPRESENTATION? ACCORDING TO THE DISSENT OF MR. JUSTICE POWELL IN HOLLOWAY, THIS QUESTION WAS EXPRESSLY LEFT UNDECIDED. IN GLASSER V. UNITED STATES, 315 U.S. 60 (1942), THE OBJECTION TO MULTIPLE REPRESENTATION WAS MADE MID-TRIAL; HOWEVER, IT MUST BE CONCEDED THAT THE OBJECTION WAS MADE IMMEDIATELY AFTER THE APPOINTMENT. IN CUYLER, THE OBJECTION WAS NEVER LODGED. IN HOLLOWAY, THE OBJECTION WAS MADE PRETRIAL. WHILE THE OBJECTION IN THIS CASE WAS LODGED INITIALLY DURING THE PRESENTATION OF THE STATE'S CASE,

THERE CAN BE NO QUESTION THAT THE TRIAL JUDGE HAD KNOWLEDGE OF AT LEAST A POSSIBLE CONFLICT EARLY IN THE CASE AND FAILED TO INVESTIGATE THIS POSSIBILITY. THIS MAKES REVERSAL AUTOMATIC UNDER HOLLOWAY WITH NO INQUIRY AS TO WHETHER THERE WAS AN ACTUAL CONFLICT OR PREJUDICE SUFFERED. SEE BROOKS V. HOPPER, 597 F.2D 57 (5TH CIR. 1979); UNITED STATES V. MEDINA-HERRERA, 606 F.2D 770 (7TH CIR. 1979), CERT. DEN 446 U.S.964; UNITED STATES V. GEORVASSILIS, 498 F.2D 883 (6TH CIR. 1974).

THERE EXISTS NO SOUND PUBLIC POLICY REASON FOR REFUSING TO APPLY HOLLOWAY WHERE AN OBJECTION IS LODGED DURING THE EARLY PART OF A CRIMINAL TRIAL, AS OPPOSED TO PRE-TRIAL. THE PETITION FOR CERTIORARI SHOULD BE GRANTED SO THIS IMPORTANT CONSTITUTIONAL QUESTION CAN BE DECIDED.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITIONER RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

LESTER L. BATES, JR.
LEAD COUNSEL

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 198_

NO. _____

STANLEY HODGE,

PETITIONER,

-VS-

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE

STATE OF SOUTH CAROLINA

The STATE, Respondent,

v.

Stanley HODGE, Appellant.

No. 21728.

Supreme Court of South Carolina.

June 10, 1982.

Defendant was convicted in the General Sessions Court, Sumter County, Ernest A. Finney, J., of conspiracy and accessory after the fact of a felony and defendant's codefendant was convicted of receiving stolen goods, conspiracy, and accessory after fact of felony, and defendant appealed. The Supreme Court held that evidence which did not show that defendant or his codefendant assisted principal felons, that is, persons who stole goods, did not support conviction as accessory.

Reversed in part and affirmed in part.

1. Conspiracy ⇐47(11)

Evidence, in prosecution for conspiracy, and accessory after fact of felony, was sufficient to show that codefendants conspired to deal in stolen goods and to support conviction for conspiracy.

2. Criminal Law ⇐70, 77

In order to find that someone is accessory after fact of felony, felony must be complete, accessory must have knowledge that principal committed felony, and accessory must harbor or assist principal felon.

3. Criminal Law ⇐82

Evidence, in prosecution for conspiracy and accessory after fact of felony, which failed to show that either defendant or his codefendant assisted principal felons, that is, persons who stole goods, did not support conviction as accessory after fact of felony.

Kenneth R. Young, Jr., Sumter, for appellant.

Atty. Gen. Daniel R. McLeod and Senior Asst. Atty. Gen. Brian P. Gibbes, Columbia, and Sol. R. Kirk McLeod, Sumter, for respondent.

PER CURIAM:

Appellant was convicted of conspiracy and accessory after the fact of a felony. Appellant's codefendant was convicted of receiving stolen goods, conspiracy, and accessory after the fact of a felony.

[1] The evidence at trial was sufficient to show that the codefendants conspired to deal in stolen goods. No error of law affects appellant's conviction for conspiracy. We affirm the lower court's judgment on this charge.

[2, 3] With respect to the conviction as an accessory, the evidence indicated the codefendants dealt with a person who was trying to sell goods stolen, not by him, but by two others. In order to find that someone is an accessory after the fact of a felony, the felony must be complete, the accessory must have knowledge that the principal committed the felony, and the accessory must harbor or assist the principal felon. *State v. Nicholson*, 221 S.C. 399, 70 S.E.2d 682 (1952). Neither appellant nor his codefendant assisted the principal felons, that is, the persons who stole the goods. Therefore, the conviction as an accessory must be reversed.

We reverse the appellant's conviction as an accessory after the fact of a felony; otherwise, the judgment below is affirmed.

APPENDIX B

QUESTION I.

WHEN A POTENTIAL CONFLICT OF INTEREST ARISES DURING TRIAL DUE TO MULTIPLE REPRESENTATION, THE COURT MUST AFFORD THE DEFENDANTS AN OPPORTUNITY TO DEMONSTRATE THAT A CONFLICT EXISTS OR CONDUCT AN INQUIRY INTO WHETHER THE DEFENDANTS HAVE VOLUNTARILY WAIVED THEIR RIGHT TO COUNSEL. (EXCEPTIONS II AND III).

The sixth amendment guarantees an accused the assistance of counsel during the course of criminal proceedings. This right does not contemplate that counsel merely be physically present during the proceedings, but requires that counsel vigorously pursue all rights, issues and defenses that may be available to the accused. When counsel is unable to fulfill these duties to a client, the client's sixth amendment right to counsel has been denied. Cuyler v. Sullivan, 446 U.S. 335 (1980). One way in which effective assistance of counsel may be impaired is by requiring a criminal defendant's attorney to represent conflicting interests during the trial of his case. Glasser v. United States, 315 U.S. 60 (1942). A trial court should not require a lawyer to simultaneously represent conflicting interests. Id. When an objection to multiple representation is raised at trial, the Court must give a defendant the opportunity to demonstrate that potential conflicts improperly infringe upon his right to a fair trial. Cuyler, supra.

Upon the trial judge rests the responsibility of ensuring that trial is conducted in a manner which respects the fundamental rights of an accused. Glasser, supra; State v. Lewis, 255 S.C. 466, 179 S.E.2d 616 (1971). One aspect of this responsibility is to protect and safeguard a criminal defendant's sixth amendment right to counsel. Although this right may be waived, waiver in this context has been defined as the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 (1938). Courts "must indulge in every reasonable presumption against waiver" of this fundamental right. Johnson, supra, quoting Aetna Insurance Co. vs. Kennedy, 301 U.S. 389 (1937). When the question arises as to whether a defendant has voluntarily waived his right to counsel, the trial court must make a clear determination of this issue which should appear in the record of the case. Glasser, supra; Johnson, supra.

No clear cut rule exists for determining whether an accused has waived his right to counsel. Waiver depends upon the facts and circumstances surrounding each individual case. Johnson, supra. What is clear, however, is that any time the question of waiver arises, the trial court must conduct an inquiry. This is especially true when the question of unconstitutional multiple representation arises. The trial court is obliged to investigate a timely motion objecting to multiple representation. Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler, supra.

it fails to do so, reversal is automatic. Holloway, supra.

In the instant case, the trial court failed to discharge its duty to Appellant because it did not give Appellant an opportunity to demonstrate that his right to a fair trial was jeopardized by a potential conflict or inquire into whether Appellant had waived his right to counsel. Appellant's attorney made a motion for a mistrial upon the ground of a conflict of interest after the close of the testimony of the State's witness, Greg Gregory. (Tr. at 76). That witness' testimony indicated a greater degree of culpability on the part of Appellant's co-defendant, Jessie McLeod, than on the part of Appellant. The court did not immediately rule upon the motion. At the close of the State's case, counsel renewed his motion. (Tr. at 96). The motion was denied at that time. Although the record is unclear as to the basis of the trial court's ruling, the court stated that "any potential conflict was known prior to the institution of these proceedings and the selection and swearing of the jury." Id. This language indicates that the trial court was of the view that Appellant had waived his right to effective assistance of counsel.

If this is the case, then the trial court erred in not conducting an inquiry to determine whether Appellant was in danger of being prejudiced due to a conflict of interest or had voluntarily waived his right to effective assistance of counsel as outlined in the Johnson, Glasser, and Holloway cases.

Because the trial court failed to discharge its duty to protect Appellant's Sixth Amendment right to counsel, Appellant's conviction must be reversed and a new trial ordered.

APPENDIX C

be an appropriate time for us to take about ten minutes, a ten minute recess. Go to your jury room. Don't discuss this matter. We will bring you back in ten minutes. Thank you a lot.

(The Jury retires to the jury room and court stands in recess for a short period, after which the trial resumed as follows.)

BY THE COURT: Yes sir, Mr. Barness? Them is something you want to put on the record?

BY ATTY. HARNESS: I would like to put on the record that I would like to make a motion for a mistrial at this point due to the testimony of the last witness on the stand. It appears to me that I may have some conflict with representing both gentlemen in this case. I would respectfully request that the Court grant us a mistrial so that we would have an opportunity to get a second counsel in to represent either one of the parties and to be sure that justice is done in this case.

BY THE COURT: All right. What is the State's position, Mr. Burchstead?

BY SOL. BURCHSTEAD: If it please the Court, I understand that the the Court has made a determination that there is a conflict of interest---

BY THE COURT: I have not made a determination, but I indicated to you gentlemen during the recess that in view of

DAISY M. MOORE
Court Reporter
HUNTER, S.C. 29160

the testimony of the witness, Mr. Gregory, that I had some grave concern that there may be, and I advised Mr. Harness, as an officer of the court, that I had some concerns--in your presence---

BY ATTY. HARNESS: Yes sir---

BY THE COURT: ---That I had some concern about the potential conflict.

BY SOL. BURCHSTEAD: My concern was this, that the statement of Gregory Gregory and the statement of Darryl Pierce, as well as some other statements, have been available to Mr. Harness back as far back as January of this year, and they have been aware of what testimony would be elicited from these witnesses; and the Defendants proceeded to trial with one counsel and I think it would be grossly unfair to the State to have him claim as a revelation suddenly that there is a conflict of interest when they knew what the testimony was going to be of these witnesses before the trial began.

BY THE COURT: All right, anything you would like to say, Mr. Harness?

BY ATTY. HARNESS: Your Honor, while statements were provided, there has been some conflict in the statements that were provided, very kindly, by the Solicitor's office and taken of the young boys back when they picked them up in December, and I had thought long and hard before I came before the bar

about if there was any conflict and it appeared to me, honestly, that there was none even with the statements that were provided.

BY THE COURT: As I perceive the testimony at this point in these proceedings, and I don't know what else is going to come down, the testimony of Mr. Gregory indicated that Mr. Hodge did not agree to buy anything and it does not implicate him at this point in these proceedings and that it does--in fact your cross examination of Mr. Gregory emphasized that point. Now we have a situation where you've got two Defendants; one who, by your questions, indicates no involvement, the other one which indicates that there is some involvement. All right---

BY SOL. BURCHSTEAD: Well, Your Honor---

BY THE COURT: Yes sir?

BY SOL. BURCHSTEAD: Of course, if that is your view of the law, even though there might not be any conflict, it would be the State's position that the testimony of Greg Gregory, taken in the light most favorable to the State, is that Stanley Hodge had a reasonable suspicion that--had reason to believe that this property was stolen, which will be further brought out by some further testimony, and he assisted these Defendants in disposing of these goods and participated with Jessie McLeod in receiving the stolen goods.

BY THE COURT: All right, sir. At this point in the

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Court Reporter
SUMTER, S.C. 29150

proceedings, I have not heard all of the testimony. I would respectfully deny the motion for a mistrial. There are counts in here where the testimony would go--it does give me some concern and I, frankly, expressed my concern to you gentlemen because I dislike the idea that there even be the appearance of some conflict, but I am going to read the statements and I may reconsider your motion at the conclusion of the State's case. I have not read the statements. They have not been furnished to me but I am going to get them and will read them and will re-entertain your motion at the conclusion of the State's case.

BY ATTY. HARNESS: Thank you, Your Honor.

BY THE COURT: Anything further from the State?

BY ATTY. HARNESS: Nothing, Your Honor.

BY THE COURT: Yes sir, Mr. Davis?

BY ATTY. T. H. Davis, III: If it please the Court, Your Honor, I would just like to put into the record my position or what I believe to be my position in this case. Mr. Harness contacted me, I believe it was several months ago, to assist him in drawing the jury in this trial, and that ha[illegible]een the extent of my involvement. I've never even spoken to these two men prior to today or read the warrants or anything else, and I just want--for the record, I sat at the counsel table with Mr. Harness pursuant to his request after helping him draw the jury; but I am not

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Court Reporter
Danville, V.C. 2468

might be an appropriate time for us to go to lunch now because there are some matters that I think counsel need to discuss. We are taking a longer lunch than usual. I am going to ask that you please be back in your jury room at 2:30, at which time we will conclude this matter. In the meantime, you are not to discuss it with anyone. Do not allow anyone to discuss it with you. When you come back, go directly to the jury room. Thank you very kindly.

(The Jury retires from the jury room to go to lunch)

BY THE COURT: Anything before we recess?

BY ATTY. HARNESS: Your Honor, I would reiterate my motion for a mistrial.

BY THE COURT: All right, sir, well he hasn't rested yet, I don't think.

BY SOL. BURCHSTEAD: No sir, I haven't---

BY ATTY. HARNESS: You have not?

BY SOL. BURCHSTEAD: No sir.

BY THE COURT: No sir. I just decided it was time to go to lunch. All right, court is recessed until 2:30.

(Court stands in recess for lunch until 2:30 P.M. at which time the trial continued as follows)

BY THE COURT: Are you ready to go, Mr. Harness?

BY ATTY. HARNESS: Yes, Your Honor.

BY THE COURT: Ready to go, Mr. Burchstead?

BY SOL. BURCHSTEAD: Yes sir. The State rests and we

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Court Reporter
MARION, S.C. 29571

can go ahead and take care of any motions now before you...

BY THE COURT: All right. Anything, Mr. Harness?

BY ATTY. HARNESS: I would reiterate my motion made earlier about...

BY THE COURT: The potential conflict?

BY ATTY. HARNESS: Yes sir, the potential conflict. I believe that some of the testimony that came before the bar today would give me reason to believe that there may be a conflict in the representation of both gentlemen, particularly with reference to the testimony of the young men that came before the bar, and I would respectfully move, as I have previously and on those same grounds, that a mistrial be granted.

BY THE COURT: All right, sir. I would respectfully deny the motion feeling that there is ample evidence, particularly after reviewing the statement that would indicate that there is sufficient evidence to submit the matter to the triers of the fact and that any potential conflict was known prior to the institution of these proceedings and the selection and swearing of the Jury.

BY ATTY. HARNESS: All right, sir, thank you. I would also like to make a motion for a directed verdict at this time on the grounds that no evidence has been presented to prove the facts at issue or which would reasonably lead to

BY THE COURT: All right, fine thank you. Do you desire to look at these verdict sheets as to the forms of the verdict?

BY ATTY. HARNESS: No sir, Your Honor.

BY THE COURT: All right, fine.

(The Jury is discharged and court stands in recess for a brief period. After the recess the Court entertained other matters unrelated to the instant case, after which the trial resumed as follows)

BY THE COURT: All right, Mr. Harness.

BY ATTY. HARNESS: Your Honor, my first motion would be a motion for a new trial. The first grounds of that would be based upon the earlier motions for mistrial for conflict of interest. I believe the Court made an error in not granting a mistrial at that point. I've already made a lengthy statement on that. I think that is sufficient for the record as the grounds for a mistrial. The second grounds would be that the Statements made by the Solicitor in closing argument were inflammatory to the disadvantage of the Defendants and as well, that the evidence was insufficient to support the verdict,there was no evidence or particular reference to conspiracy, or that there was anything more than a mere association, or that they counseled or hired anyone to commit any crimes or participated in that knowingly. With regard to stolen goods, that there was no knowledge involved

on the part of either one of these Defendants in participating in the crime. That would be the motion for a new trial.

BY THE COURT: All right, thank you. I would respectfully deny the motion for new trial on the grounds as made, the Court feeling that the rulings which have previously been entered upon the record would still be applicable to the current situation. I don't believe that there has been any new information or anything new inserted into the record. Is that right?

BY ATTY. HARNESS: That is correct, Your Honor.

BY THE COURT: So on the grounds as previously made, I would deny the motion for a new trial.

BY ATTY. HARNESS: All right, sir. The second motion, I'd like to make a motion for Judgment N.O.V., that the Jury's decision was not based upon the facts and the evidence that was presented, that it was based upon passion or some inflammatory statements that were made by the Solicitor in closing arguments, and that as a consequence the judgment should be overturned.

BY THE COURT: I would respectfully deny the motion for Judgment N.O.V. stating that the Jury's verdict was in accordance with one logical explanation of the facts and the evidence which was introduced during the course of the trial.

BY ATTY. HARNESS: All right, sir. The third motion

would be a motion to be relieved as attorney on the appeal process on the grounds that the Judge has already ruled that there is a conflict which exists---

BY THE COURT: I said there may be a conflict---

BY ATTY. HARNESS: Yes sir, there may be a conflict. As a consequence I think that, on the part of the Defendants, that it would be better if two other attorneys would represent them so that there would be no conflict or any appearance of impropriety as far as myself or anyone else involved in the case.

BY THE COURT: I will note your motion to be relieved as counsel, but I do not think that I have the authority at this juncture to relieve you on the basis which you have inserted into the record. The Court, in an abundance of caution, very early in these proceedings when the first or second State's witness testified, admonished counsel that there may be a potential conflict developing and subsequent thereto did in fact rule that there was no conflict, otherwise we would have declared a mistrial because the testimony, as it developed from the State's witnesses and from the two Defendants, all indicated in substance the same circumstances upon which the Court felt that there may have been a conflict.

Now we recognize fully that both of the Defendants took different positions with regard to the State's case as far as their knowledge concerning the goods and whether they

IN THE
SUPREME COURT OF THE UNITED STATES
TERM 198_
NO. _____

STANLEY HODGE, PETITIONER, -VS- THE STATE OF SOUTH CAROLINA, RESPONDENT.	NOTARIZED STATEMENT

LESTER L. BATES, JR., ESQUIRE, BEING DULY SWORN, DEPOSES AND STATES:

1. THAT HE IS AN ATTORNEY-AT-LAW, DULY LICENSED BY THE STATE OF SOUTH CAROLINA.

2. THAT HE IS A MEMBER OF THE BAR OF THIS HONORABLE COURT AND WAS ADMITTED TO AFORESAID BAR ON MAY 24, 1965.

3. THAT ON AUGUST 9, 1982, HE MAILED FORTY (40) COPIES OF THE PETITION FOR CERTIORARI TO THE HONORABLE CLERK OF THE SUPREME COURT OF THE UNITED STATES, BY

DEPOSITING AFORESAID COPIES IN A MAIL-BOX LOCATED IN THE MAIN UNITED STATES POST OFFICE IN COLUMBIA, SOUTH CAROLINA, WITH FIRST-CLASS POSTAGE PREPAID, AND PROPERLY ADDRESSED TO THE CLERK OF THIS COURT WITHIN THE TIME ALLOWED FOR FILING.

4. THAT THIS STATEMENT IS MADE AND FILED IN ACCORDANCE WITH RULE 28.2 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

Lester L. Bates, Jr.

LESTER L. BATES, JR.
POST OFFICE BOX 1485
COLUMBIA, S.C. 29202
(803) 779-4238

AUGUST 9th, 1982
COLUMBIA, SOUTH CAROLINA

SWORN TO BEFORE ME THIS
9th DAY OF AUGUST, 1982.

Jean P. Bass

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES:

IN THE
SUPREME COURT OF THE UNITED STATES
TERM 198_
NO. _____

STANLEY HODGE, PETITIONER, -VS- THE STATE OF SOUTH CAROLINA, RESPONDENT.	NOTARIZED STATEMENT

LESTER L. BATES, JR., ESQUIRE, BEING DULY SWORN, DEPOSES AND STATES:

1. THAT HE IS AN ATTORNEY-AT-LAW, DULY LICENSED BY THE STATE OF SOUTH CAROLINA.

2. THAT HE IS A MEMBER OF THE BAR OF THIS HONORABLE COURT AND WAS ADMITTED TO AFORESAID BAR ON MAY 24, 1965.

3. THAT ON AUGUST 9, 1982, HE MAILED THREE (3) COPIES OF THE PETITION FOR CERTIORARI TO THE HONORABLE DANIEL R. MCLEOD, LEAD COUNSEL FOR THE RESPONDENT,

BY DEPOSITING AFORESAID COPIES IN A MAILBOX LOCATED IN THE MAIN UNITED STATES POST OFFICE IN COLUMBIA, SOUTH CAROLINA, WITH FIRST-CLASS POSTAGE PREPAID AND PROPERLY ADDRESSED TO THE HONORABLE DANIEL R. MCLEOD WITHIN THE TIME ALLOWED FOR FILING.

4. THAT THIS STATEMENT IS MADE AND FILED IN ACCORDANCE WITH RULE 28.3 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

5. THAT ALL PARTIES REQUIRED TO BE SERVED IN THIS CASE HAVE BEEN SERVED, TO WIT:

THE HONORABLE DANIEL R. MCLEOD
ATTORNEY GENERAL OF SOUTH CAROLINA
POST OFFICE BOX 11548
COLUMBIA, SOUTH CAROLINA 29211

Lester R. Bates, Jr.

LESTER R. BATES, JR.
POST OFFICE BOX 1485
COLUMBIA, S. C. 29202

AUGUST 9th, 1982
COLUMBIA, SOUTH CAROLINA

SWORN TO BEFORE ME THIS
9th DAY OF AUGUST, 1982.

Joan R. Sims
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES:

82-302

Supreme Court, U.S.
FILED
AUG 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 198_

NO. _____

STANLEY HODGE,

PETITIONER,

-VS-

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

SUPLEMENTAL

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE

STATE OF SOUTH CAROLINA

LESTER L. BATES, JR.
LEAD COUNSEL

POST OFFICE BOX 1485
COLUMBIA, SOUTH CAROLINA 29202
(803) 779-4238

STATE V. HODGE

CITE AS ___S.C.___ 292 S.E.2D 600

THE STATE, RESPONDENT,

V.

STANLEY HODGE, APPELLANT.

NO. 21728

SUPREME COURT OF SOUTH CAROLINA

JUNE 10, 1982

DEFENDANT WAS CONVICTED IN THE GENERAL SESSIONS COURT, SUMTER COUNTY, ERNEST A. FINNEY, J., OF CONSPIRACY AND ACCESSORY AFTER THE FACT OF FELONY AND DEFENDANT'S CO-DEFENDANT WAS CONVICTED OF RECEIVING STOLEN GOODS, CONSPIRACY, AND ACCESSORY AFTER FACT OF FELONY, AND DEFENDANT APPEALED. THE SUPREME COURT HELD THAT EVIDENCE WHICH DID NOT SHOW THAT DEFENDANT OR HIS CO-DEFENDANT ASSISTED PRINCIPAL FELONS, THAT IS, PERSONS WHO STOLE GOODS, DID NOT SUPPORT CONVICTION AS ACCESSORY.

REVERSED IN PART AND AFFIRMED IN PART.

1. CONSPIRACY --47(11)

EVIDENCE, IN PROSECUTION FOR CONSPIRACY, AND ACCESSORY AFTER FACT OF FELONY, WAS SUFFICIENT TO SHOW THAT CO-DEFENDANTS CONSPIRED TO DEAL IN STOLEN GOODS AND TO SUPPORT CONVICTION FOR CONSPIRACY.

2. CRIMINAL LAW -- 76,77

IN ORDER TO FIND THAT SOMEONE IS ACCESSORY AFTER FACT OF FELONY, FELONY MUST BE COMPLETE, ACCESSORY MUST HAVE KNOWLEDGE THAT PRINCIPAL COMMITTED FELONY, AND ACCESSORY MUST HARBOR OR ASSIST PRINCIPAL FELON.

3. CRIMINAL LAW -- 82

EVIDENCE, IN PROSECUTION FOR CONSPIRACY AND ACCESSORY AFTER FACT OF FELONY, WHICH FAILED TO SHOW THAT EITHER DEFENDANT OR HIS CO-DEFENDANT ASSISTED PRINCIPAL FELONS, THAT

IS, PERSONS WHO STOLE GOODS, DID NOT SUPPORT CONVICTION AS ACCESSORY AFTER FACT OF FELONY.

KENNETH R. YOUNG, JR., SUMTER, FOR APPELLANT.

ATTORNEY GEN. DANIEL R. MCLEOD AND SENIOR ASST. ATTY. GEN. BRIAN P. GIBBES, COLUMBIA, AND SOL. R. KIRK MCLEOD, SUMTER, FOR RESPONDENT.

PER CURIAM:

APPELLANT WAS CONVICTED OF CONSPIRACY AND ACCESSORY AFTER THE FACT OF A FELONY. APPELLANT'S CO-DEFENDANT WAS CONVICTED OF RECEIVING STOLEN GOODS, CONSPIRACY, AND ACCESSORY AFTER THE FACT OF A FELONY.

[1] THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SHOW THAT THE CO-DEFENDANTS CONSPIRED TO DEAL IN STOLEN GOODS. NO ERRORS OF LAW AFFECTS APPELLANT'S CONVICTION FOR CONSPIRACY. WE AFFIRM THE LOWER COURT'S JUDGMENT ON THIS CHARGE.

[2,3] WITH RESPECT TO THE CONVICTION AS AN ACCESSORY, THE EVIDENCE INDICATED THE CO-DEFENDANTS DEALT WITH A PERSON WHO WAS TRYING TO SELL GOODS STOLEN, NOT BY HIM, BUT BY TWO OTHERS. IN ORDER TO FIND THAT SOMEONE IS AN ACCESSORY AFTER THE FACT OF A FELONY, THE FELONY MUST BE COMPLETE, THE ACCESSORY MUST HAVE KNOWLEDGE THAT THE PRINCIPAL COMMITTED THE FELONY, AND THE ACCESSORY MUST HARBOR OR ASSIST THE PRINCIPAL FELON. STATE V. NICHOLSON, 221 S.C. 399, 70 S.E.2D 632 (1952). NEITHER APPELLANT NOR HIS CO-DEFENDANT ASSISTED THE PRINCIPAL FELONS, THAT IS, THE PERSONS WHO STOLE THE GOODS. THEREFORE, THE CONVICTION AS AN ACCESSORY MUST BE REVERSED.

WE REVERSE THE APPELLANT'S CONVICTION AS AN ACCESSORY AFTER THE FACT OF FELONY, OTHERWISE, THE JUDGMENT BELOW IS AFFIRMED.

QUESTION I.

WHEN A POTENTIAL CONFLICT OF INTEREST ARISES DURING TRIAL DUE TO MULTIPLE REPRESENTATION, THE COURT MUST AFFORD THE DEFENDANTS AN OPPORTUNITY TO DEMONSTRATE THAT A CONFLICT EXISTS OR CONDUCT AN INQUIRY INTO WHETHER THE DEFENDANTS HAVE VOLUNTARILY WAIVED THEIR RIGHT TO COUNSEL. (EXCEPTIONS II AND III).

THE SIXTH AMENDMENT GUARANTEES AN ACCUSED THE ASSISTANCE OF COUNSEL DURING THE COURSE OF CRIMINAL PROCEEDINGS. THIS RIGHT DOES NOT CONTEMPLATE THAT COUNSEL MERELY BE PHYSICALLY PRESENT DURING THE PROCEEDINGS, BUT REQUIRES THAT COUNSEL VIGOROUSLY PURSUE ALL RIGHTS, ISSUES AND DEFENSES THAT MY BE AVAILABLE TO THE ACCUSED. WHEN COUNSEL IS UNABLE TO FULFILL THESE DUTIES TO A CLIENT, THE CLIENT'S SIXTH AMENDMENT RIGHT TO COUNSEL HAS BEEN DENIED. CUYLER V. SULLIVAN, 446 U.S. 335 (1980). ONE WAY IN WHICH EFFECTIVE

ASSISTANCE OF COUNSEL MAY BE IMPAIRED IS BY REQUIRING A CRIMINAL DEFENDANT'S ATTORNEY TO REPRESENT CONFLICTING INTERESTS DURING THE TRIAL OF HIS CASE. GLASSER V. UNITED STATES, 315 U.S. 60 (1942). A TRIAL COURT SHOULD NOT REQUIRE A LAWYER TO SIMULTANEOUSLY REPRESENT CONFLICTING INTERESTS. ID. WHEN AN OBJECTION TO MULTIPLE REPRESENTATION IS RAISED AT TRIAL, THE COURT MUST GIVE A DEFENDANT THE OPPORTUNITY TO DEMONSTRATE THAT POTENTIAL CONFLICTS IMPROPERLY INFRINGE UPON HIS RIGHT TO A FAIR TRIAL. CUYLER, SUPRA.

UPON THE TRIAL JUDGE RESTS THE RESPONSIBILITY OF ENSURING THAT TRIAL IS CONDUCTED IN A MANNER WHICH RESPECTS THE FUNDAMENTAL RIGHTS OF AN ACCUSED. GLASSER, SUPRA; STATE V. LEWIS, 255 S.C. 466, 179 S.E.2D 616 (1971). ONE ASPECT OF THIS RESPONSIBILITY IS TO PROTECT AND SAFEGUARD A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL. ALTHOUGH THIS RIGHT MAY BE WAIVED, WAIVER IN THIS

CONTEXT HAS BEEN DEFINED AS THE "INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A KNOWN RIGHT OR PRIVILEGE." JOHNSON V. ZERBST, 304 U.S. 458 (1938). COURTS "MUST INDULGE IN EVERY REASONABLE PRESUMTPION AGAINST WAIVER" OF THIS FUNDAMENTAL RIGHT. JOHNSON, SUPRA, QUOTING AETNA INSURANCE CO. VS. KENNEDY, 301 U.S. 389 (1937). WHEN THE QUESTION ARISES AS TO WHETHER A DEFENDANT HAS VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL, THE TRIAL COURT MUST MAKE A CLEAR DETERMINATION OF THIS ISSUE WHICH SHOULD APPEAR IN THE RECORD OF THE CASE. GLASSER, SUPRA; JOHNSON, SUPRA.

NO CLEAR CUT RULE EXISTS FOR DETERMINING WHETHER AN ACCUSED HAS WAIVED HIS RIGHT TO COUNSEL. WAIVER DEPENDS UPON THE FACTS AND CIRCUMSTANCES SURROUNDING EACH INDIVIDUAL CASE. JOHNSON, SUPRA. WHAT IS CLEAR, HOWEVER, IS THAT ANY TIME THE QUESTION OF WAIVER ARISES, THE TRIAL COURT MUST CONDUCT AN INQUIRY. THIS IS ESPECIALLY TRUE WHEN THE

QUESTION OF UNCONSTITUTIONAL MULTIPLE REPRESENTATION ARISES. THE TRIAL COURT IS OBLIGED TO INVESTIGATE A TIMELY MOTION OBJECTING TO MULTIPLE REPRESENTATION. HOLLOWAY V. ARKANSAS, 435 U.S. 475 (1978); CUYLER, SUPRA. (IF) IT FAILS TO DO SO, REVERSAL IS AUTOMATIC. HOLLOWAY, SUPRA.

IN THE INSTANT CASE, THE TRIAL COURT FAILED TO DISCHARGE ITS DUTY TO APPELLANT BECAUSE IT DID NOT GIVE APPELLANT AN OPPORTUNITY TO DEMONSTRATE THAT HIS RIGHT TO A FAIR TRIAL WAS JEOPARDIZED BY A POTENTIAL CONFLICT OR INQUIRE INTO WHETHER APPELLANT HAD WAIVED HIS RIGHT TO COUNSEL. APPELLANT'S ATTORNEY MADE A MOTION FOR A MISTRIAL UPON THE GROUND OF A CONFLICT OF INTEREST AFTER THE CLOSE OF THE TESTIMONY OF THE STATE'S WITNESS, GREG GREGORY. (TR. AT 76). THAT WITNESS' TESTIMONY INDICATED A GREATER DEGREE OF CULPABILITY ON THE PART OF APPELLANT'S CO-DEFENDANT, JESSIE MCLEOD, THAN ON THE PART

OF APPELLANT. THE COURT DID NOT IMMEDIATELY RULE UPON THE MOTION. AT THE CLOSE OF THE STATE'S CASE, COUNSEL RENEWED HIS MOTION. (TR. AT 96). THE MOTION WAS DENIED AT THAT TIME. ALTHOUGH THE RECORD IS UNCLEAR AS TO THE BASIS OF THE TRIAL COURT'S RULING, THE COURT STATED THAT "ANY POTENTIAL CONFLICT WAS KNOWN PRIOR TO THE INSTITUTION OF THESE PROCEEDINGS AND THE SELECTION AND SWEARING OF THE JURY." ID. THIS LANGUAGE INDICATES THAT THE TRIAL COURT WAS OF THE VIEW THAT APPELLANT HAD WAIVED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

IF THIS IS THE CASE, THEN THE TRIAL COURT ERRED IN NOT CONDUCTING AN INQUIRY TO DETERMINE WHETHER APPELLANT WAS IN DANGER OF BEING PREJUDICED DUE TO A CONFLICT OF INTEREST OR HAD VOLUNTARILY WAIVED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS OUTLINED IN THE JOHNSON, GLASSER, AND HOLLOWAY CASES. BECAUSE THE TRIAL COURT FAILED

TO DISCHARGE ITS DUTY TO PROTECT APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, APPELLANT'S CONVICTION MUST BE REVERSED AND A NEW TRIAL ORDERED.

(THE JURY RETIRES TO THE JURY ROOM AND COURT STANDS IN RECESS FOR A SHORT PERIOD, AFTER WHICH THE TRIAL RESUMED AS FOLLOWS.)

BY THE COURT: YES SIR, MR. HARNESS? THERE IS SOMETHING YOU WANT TO PUT ON THE RECORD?

BY ATTY. HARNESS: I WOULD LIKE TO PUT ON THE RECORD THAT I WOULD LIKE TO MAKE A MOTION FOR A MISTRIAL AT THIS POINT DUE TO THE TESTIMONY OF THE LAST WITNESS ON THE STAND. IT APPEARS TO ME THAT I MAY HAVE SOME CONFLICT WITH REPRESENTING BOTH GENTLEMEN IN THIS CASE. I WOULD RESPECTFULLY REQUEST THAT THE COURT GRANT US A MISTRIAL SO THAT WE WOULD HAVE AN OPPORTUNITY TO GET A SECOND COUNSEL IN TO REPRESENT EITHER ONE OF THE PARTIES AND TO BE SURE THAT JUSTICE IS DONE IN THIS CASE.

BY THE COURT: ALL RIGHT. WHAT IS THE STATE'S POSITION, MR. BURCHSTEAD?

BY SOL. BURCHSTEAD: IF IT PLEASE THE COURT, I UNDERSTAND THAT THE COURT HAS

MADE A DETERMINATION THAT THERE IS A CONFLICT OF INTEREST---

BY THE COURT: I HAVE NOT MADE A DETERMINATION, BUT I INDICATED TO YOU GENTLEMEN DURING THE RECESS THAT IN VIEW OF

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THE TESTIMONY OF THE WITNESS, MR. GREGORY, THAT I HAD SOME GRAVE CONCERN THAT THERE MAY BE, AND I ADVISED MR. HARNESS, AS AN OFFICER OF THE COURT, THAT I HAD SOME CONCERNS-- IN YOUR PRESENCE---

BY ATTY. HARNESS: YES SIR---

BY THE COURT: ---THAT I HAD SOME CONCERN ABOUT THE POTENTIAL CONFLICT.

BY SOL. BURCHSTEAD: MY CONCERN WAS THIS, THAT THE STATEMENT OF GREGORY GREGORY AND THE STATEMENT OF DARRYL PIERCE, AS WELL AS SOME OTHER STATEMENTS, HAVE BEEN AVAILABLE TO MR. HARNESS BACK AS FAR BACK AS JANUARY OF THIS YEAR, AND THEY HAVE BEEN AWARE OF WHAT TESTIMONY WOULD BE ELICITED FROM THESE WITNESSES; AND THE DEFENDANTS PROCEEDED TO TRIAL WITH ONE COUNSEL AND I THINK IT WOULD BE GROSSLY UNFAIR TO THE STATE TO HAVE HIM CLAIM AS A REVELATION SUDDENLY THAT THERE IS A CONFLICT OF INTEREST WHEN THEY KNEW WHAT THE TESTIMONY WAS GOING TO

BE OF THESE WITNESSES BEFORE THE TRIAL BEGAN.

BY THE COURT: ALL RIGHT, ANYTHING YOU WOULD LIKE TO SAY, MR. HARNESS?

BY ATTY. HARNESS: YOUR HONOR, WHILE STATEMENTS WERE PROVIDED, THERE HAS BEEN SOME CONFLICT IN THE STATEMENTS THAT WERE PROVIDED, VERY KINDLY, BY THE SOLICITOR'S OFFICE AND TAKEN OF THE YOUNG BOYS BACK WHEN THEY PICKED THEM UP IN DECEMBER, AND I HAD THOUGHT LONG AND HARD BEFORE I CAM BEFORE THE BAR

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ABOUT IF THERE WAS ANY CONFLICT AND IT APPEARED TO ME, HONESTLY, THAT THERE WAS NONE EVEN WITH THE STATEMENTS THAT WERE PROVIDED.

BY THE COURT: AS I PERCEIVE THE TESTIMONY AT THIS POINT IN THESE PROCEEDINGS, AND I DON'T KNOW WHAT ELSE IS GOING TO COME DOWN, THE TESTIMONY OF MR. GREGORY INDICATED THAT MR. HODGE DID NOT AGREE TO BUY ANYTHING AND IT DOES NOT IMPLICATE HIM AT THIS POINT IN THESE PROCEEDINGS AND THAT IT DOES--IN FACT YOUR CROSS EXCAMINATION OF MR. GREGORY EMPHASIZED THAT POINT. NOW WE HAVE A SITUATION WHERE YOU'VE GOT TWO DEFENDANTS; ONE WHO, BY YOUR QUESTIONS, INDICATES NO INVOLVEMENT, THE OTHER ONE WHICH INDICATES THAT THERE IS SOME INVOLVEMENT. ALL RIGHT---

BY SOL. BURCHSTEAD: WELL, YOUR HONOR---

BY THE COURT: YES SIR?

BY SOL. BURCHSTEAD: OF COURSE, IF THAT IS YOUR VIEW OF THE LAW, EVEN THOUGH

THERE MIGHT NOT BE ANY CONFLICT, IT WOULD BE THE STATE'S POSITION THAT THIS TESTIMONY OF GREG GREGORY, TAKEN IN THE LIGHT MOST FAVORABLE TO THE STATE, IS THAT STANLEY HODGE HAD A REASONABLE SUSPICION THAT-- HAD REASON TO BELIEVE THAT THIS PROPERTY WAS STOLEN, WHICH WILL BE FURTHER BROUGHT OUT BY SOME FURTHER TESTIMONY, AND HE ASSISTED THESE DEFENDANTS IN DISPOSING OF THESE GOODS AND PARTICIPATED WITH JESSIE MCLEOD IN RECEIVING THE STOLEN GOODS.

BY THE COURT: ALL RIGHT, SIR. AT THIS POINT IN THE

END OF PAGE 75 OF TRANSCRIPT

PROCEEDINGS, I HAVE NOT HEARD ALL OF THE TESTIMONY. I WOULD RESPECTFULLY DENY THE MOTION FOR A MISTRIAL. THERE ARE COUNTS IN HERE WHERE THE TESTIMONY WOULD GO--IT DOES GIVE ME SOME CONCERN AND I, FRANKLY, EXPRESSED MY CONCERN TO YOU GENTLEMEN BECAUSE I DISLIKE THE IDEA THAT THERE EVEN BE THE APPEARANCE OF SOME CONFLICT, BUT I AM GOING TO READ THE STATEMENTS AND I MAY RECONSIDER YOUR MOTION AT THE CONCLUSION OF THE STATE'S CASE. I HAVE NOT READ THE STATEMENTS. THEY HAVE NOT BEEN FURNISHED TO ME BUT I AM GOING TO GET THEM AND WILL READ THEM AND WILL RE-ENTERTAIN YOUR MOTION AT THE CONCLUSION OF THE STATE'S CASE.

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(COURT STANDS IN RECESS FOR LUNCH UNTIL 2:30 P.M. AT WHICH TIME THE TRIAL CONTINUED AS FOLLOWS)

BY THE COURT: ARE YOU READY TO GO, MR. HARNESS?

BY ATTY. HARNESS: YES, YOUR HONOR.

BY THE COURT: READY TO GO, MR. BURCH-STEAD?

BY SOL. BURCHSTEAD: YES SIR. THE STATE RESTS AND WE

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CAN GO AHEAD AND TAKE CARE OF ANY MOTIONS NOW BEFORE YOU...

BY THE COURT: ALL RIGHT. ANYTHING, MR. HARNESS?

BY ATTY. HARNESS: I WOULD REITERATE MY MOTION MADE EARLIER ABOUT...

BY THE COURT: THE POTENTIAL CONFLICT?

BY ATTY HARNESS: YES SIR, THE POTENTIAL CONFLICT. I BELIEVE THAT SOME OF THE TESTIMONY THAT CAME BEFORE THE BAR TODAY WOULD GIVE ME REASON TO BELIEVE THAT THERE MAY BE A CONFLICT IN THE REPRESENTATION OF BOTH GENTLEMEN, PARTICULARLY WITH REFERENCE TO THE TESTIMONY OF THE YOUNG MEN THAT CAME BEFORE THE BAR, AND I WOULD RESPECTFULLY MOVE, AS I HAVE PREVIOUSLY AND ON THOSE SAME GROUNDS, THAT A MISTRIAL BE GRANTED.

BY THE COURT: ALL RIGHT, SIR. I WOULD RESPECTFULLY DENY THE MOTION FEELING THAT THERE IS AMPLE EVIDENCE, PARTICULARLY AFTER REVIEWING THE STATEMENT THAT WOULD INDICATE

THAT THERE IS SUFFICIENT EVIDENCE TO SUBMIT THE MATTER TO THE TRIERS OF THE FACT AND THAT ANY POTENTIAL CONFLICT WAS KNOWN PRIOR TO THE INSTITUTION OF THESE PROCEEDINGS AND THE SELECTION AND SWEARING OF THE JURY.

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(THE JURY IS DISCHARGED AND COURT STANDS IN RECESS FOR A BRIEF PERIOD. AFTER THE RECESS THE COURT ENTERTAINED OTHER MATTERS UNRELATED TO THE INSTANCE CASE, AFTER WHICH THE TRIAL RESUMED AS FOLLOWS)

BY THE COURT: ALL RIGHT, MR. HARNESS.

BY ATTY HARNESS: YOUR HONOR, MY FIRST MOTION WOULD BE A MOTION FOR A NEW TRIAL. THE FIRST GROUNDS OF THAT WOULD BE BASED UPON THE EARLIER MOTIONS FOR MIS-TRIAL FOR CONFLICT OF INTEREST. I BELIEVE THE COURT MADE AN ERROR IN NOT GRANTING A MISTRIAL AT THAT POINT. I'VE ALREADY MADE A LENGTHY STATEMENT ON THAT. I THINK THAT IS SUFFICIENT FOR THE RECORD AS THE GROUNDS FOR A MISTRIAL. THE SECOND GROUNDS WOULD BE THAT THE STATEMENTS MADE BY THE SOLICITOR IN CLOSING ARGUMENT WERE INFLAMMATORY TO THE DISADVANTAGE OF THE DEFENDANTS AND AS WELL, THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT, THERE WAS NO EVIDENCE OR PARTIC-

ULAR REFERENCE TO CONSPIRACY, OR THAT THERE WAS ANYTHING MORE THAN A MERE ASSOCIATION, OR THAT THEY COUNSELED OR HIRED ANYONE TO COMMIT ANY CRIMES OR PARTICIPATED IN THAT KNOWINGLY. WITH REGARD TO STOLEN GOODS, THAT THERE WAS NO KNOWLEDGE INVOLVED

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ON THE PART OF EITHER ONE OF THESE DEFENDANTS IN PARTICIPATING INTHE CRIME. THAT WOULD BE THE MOTION FOR A NEW TRIAL.

BY THE COURT: ALL RIGHT, THANK YOU. I WOULD RESPECTFULLY DENY THE MOTION FOR NEW TRIAL ON THE GROUNDS AS MADE, THE COURT FEELING THAT THE RULINGS WHICH HAVE PREVIOUSLY BEEN ENTERED UPON THE RECORD WOULD STILL BE APPLICABLE TO THE CURRENT SITUATION. I DON'T BELIEVE THAT THERE HAS BEEN ANY NEW INFORMATION OR ANYTHING NEW INSERTED INTO THE RECORD. IS THAT RIGHT?

BY ATTY. HARNESS: THAT IS CORRECT, YOUR HONOR.

BY THE COURT: SO ON THE GROUNDS AS PREVIOUSLY MADE, I WOULD DENY THE MOTION FOR A NEW TRIAL.

BY ATTY HARNESS: ALL RIGHT, SIR. THE SECOND MOTION, I'D LIKE TO MAKE A MOTION FOR JUDGMENT N.O.V., THAT THE JURY'S DECISION WAS NOT BASED UPON THE FACTS AND

THE EVIDENCE THAT WAS PRESENTED, THAT IT WAS BASED UPON PASSION OR SOME INFLAMMATORY STATEMENTS THAT WERE MADE BY THE SOLICITOR IN CLOSING ARGUMENTS, AND THAT AS A CONSE-QUENCE THE JUDGMENT SHOULD BE OVERTURNED.

BY THE COURT: I WOULD RESPECTFULLY DENY THE MOTION FOR JUDGMENT N.O.V. STATING THAT THE JURY'S VERDICT WAS IN ACCORDANCE WITH ONE LOGICAL EXPLANATION OF THE FACTS AND THE EVIDENCE WHICH WAS INTRODUCED DURING THE COURSE OF THE TRIAL.

BY ATTY HARNESS: ALL RIGHT, SIR. THE THIRD MOTION

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WOULD BE A MOTION TO BE RELIEVED AS ATTORNEY ON THE APPEAL PROCESS ON THE GROUNDS THAT THE JUDGE HAS ALREADY RULED THAT THERE IS A CONFLICT WHICH EXISTS---

BY THE COURT: I SAID THERE MAY BE A CONFLICT---

BY ATTY. HARNESS: YES SIR, THERE MAY BE A CONFLICT. AS A CONSEQUENCE I THINK THAT, ON THE PART OF THE DEFENDANTS, THAT IT WOULD BE BETTER IF TWO OTHER ATTORNEYS WOULD REPRESENT THEM SO THAT THERE WOULD BE NO CONFLICT OR ANY APPEARANCE OF IMPROPRIETY AS FAR AS MYSELF OR ANYONE ELSE INVOLVED IN THE CASE.

BY THE COURT: I WILL NOTE YOUR MOTION TO BE RELIEVED AS COUNSEL, BUT I DO NOT THINK THAT I HAVE THE AUTHORITY AT THIS JUNCTURE TO RELIEVE YOU ON THE BASIS WHICH YOU HAVE INSERTED INTO THE RECORD. THE COURT, IN AN ABUNDANCE OF CAUTION, VERY EARLY IN THESE PROCEEDINGS WHEN THE FIRST OR SECOND

STATE'S WITNESS TESTIFIED, ADMONISHED COUNSEL THAT THERE MAY BE POTENTIAL CONFLICT DEVELOPING AND SUBSEQUENT THERETO DID IN FACT RULE THAT THERE WAS NO CONFLICT, OTHERWISE WE WOULD HAVE DECLARED A MISTRIAL BECAUSE THE TESTIMONY, AS IT DEVELOPED FROM THE STATE'S WITNESSES AND FROM THE TWO DEFENDANTS, ALL INDICATED IN SUBSTANCE THE SAME CIRCUMSTANCES UPON WHICH THE COURT FELT THAT THERE MAY HAVE BEEN A CONFLICT.

END PAGE 201 OF TRANSCRIPT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

STANLEY HODGE,	)	
	)	
PETITIONER,	)	
	)	
-VS-	)	ORDER
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

THIS MATTER CAME TO BE HEARD BEFORE ME UPON THE PETITION TO STAY THE ENFORCEMENT OF THE SENTENCE IN THIS CASE.

AFTER REVIEWING THE PETITION, THE DECISION OF THIS COURT DATED JUNE 10, 1982 AND A TRUE COPY OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES, I FIND THAT THE PETITION SHOULD BE GRANTED.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED THAT:

THE ENFORCEMENT OF THE JUDGMENT HEREIN BE STAYED AND THE PETITIONER'S BOND BE CONTINUED PENDING A DECISION ON THE PETITION FOR WRIT OF CERTIORARI BY THE SUPREME COURT OF THE UNITED STATES.

AND IT IS SO ORDERED.

S/ J. WOODROW LEWIS

THE HONORABLE J. WOODROW LEWIS
CHIEF JUSTICE, SUPREME COURT
OF SOUTH CAROLINA

AUGUST 11, 1982
COLUMBIA, SOUTH CAROLINA

CERTIFIED TRUE COPY.
(SEAL)

DEPUTY CLERK, S.C. SUPREME COURT

82-302

82-351

IN THE

Office - Supreme Court, U.S.
FILED
SEP 18 1982
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 198_

No.

JESSIE McLEOD and STANLEY HODGE, Petitioners

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

IN THE

SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21729 as to Petitioner McLeod and Opinion No. 21728 as to Petitioner Hodge, filed June 10, 1982, as reproduced in Petitioners' Appendix A.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the trial court properly refuse to grant the defense a mistrial since it was able to determine, upon inquiry, that there was no actual conflict of interests between defendants McLeod and Hodge?

ARGUMENT

The trial court properly refused to grant the defense a mistrial since it was able to determine, upon inquiry, that there was no actual conflict of interest between defendants McLeod and Hodge.

On this issue Petitioners claim that the trial court did not give them "an opportunity to demonstrate that their right to a fair trial was jeopardized by a potential conflict or whether Petitioners waived their right to counsel." They claim this case should be decided in their favor under this Court's decisions of Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333,

100 S. Ct. 1708 (1980) and Holloway v. Arkansas, 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978). Their arguments are not supported by the Record in this case and they are without merit.

Contrary to Petitioners' argument in their briefs, the trial court did inquire into the possibility of a conflict arising from joint representation of the defendants McLeod and Hodge and the Record shows, in fact, that the trial court raised the issue, sua sponte. The gravamen of the court's and counsels' concern regarding this matter was whether the codefendants would, in fact, give conflicting testimony which would be antagonistic to their defenses. However, when the matter was first raised, the trial court stated that there was no actual conflict apparent but that it would re-entertain counsel's motion for a mistrial at a later time if an actual conflict did appear in the testimony. The motion was

renewed at the conclusion of all evidence, and the trial court made the following ruling:

> BY THE COURT: Mr. Harness, as I perceive the evidence at this point, both of the defendants [Hodge and McLeod] have taken the stand and they have told, for all practical purposes, related the identical set of facts. I, therefore, would respectfully deny your motion. I think Mr. Hodge testified that he didn't buy it [the stolen goods]. The witness Mr. Gregory testified that Mr. Hodge didn't buy it; but Mr. McLeod testified and indicated during his testimony that he did in fact make the purchase [of the stolen goods].

The lower court found, as a matter of fact, that the defenses of these codefendants were not antagonistic or inconsistent so as to create an actual conflict of interest.

The resolution of an attorney's motion to be dismissed from further representation of his client due to conflicts of interest is within the discretion of the trial judge. State v. Jones, 270 S.C. 587, 243 S.E. 2d 461 (1978); State v. Avery, 255 S.C. 570, 180 S.E. 2d 190 (1971). Rule

5 of the rules promulgated under the Defense of Indigents Act further provides that retained counsel shall continue representation until final judgment unless he is relieved by the court upon a showing of good cause. The burden of demonstrating satisfactory cause for removal is upon the Appellant. State v. Hyman, Smith's Advance Sheets, O. No. 21524, July 22, 1981. In this case the court was solicitous of the Petitioners' right to independent counsel and determined after sufficient inquiry on the issue that there would be no actual conflict of interest to justify a mistrial or relieving counsel of his duties.

The case of Cuyler v. Sullivan, supra, is inapposite to the facts of this case since it holds that a defendant who raises no objection at trial to his counsel's conflicts of interest must show that an actual conflict of interest adversely

affected his lawyer's performance. In this case the trial judge moved into an inquiry on the subject of his own accord and found there to be no actual conflict. Likewise, Holloway v. Arkansas, supra, is totally inapposite to the facts of this case since it involved proper pretrial motions based upon a conflict of interest in representing multiple defendants in a criminal case where the conflict was so patently evident on the record that the court held no further inquiry was necessary. Furthermore, the trial court in Holloway failed to make an inquiry at trial as to the nature of any potential conflict. The appeal on this issue is without merit and it should be, accordingly, dismissed.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT.